

## IS POST-KELO EMINENT DOMAIN REFORM BAD FOR THE POOR?<sup>†</sup>

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### INTRODUCTION

In a recent essay in the *Northwestern University Law Review*,<sup>1</sup> Professor David Dana argues that most post-*Kelo* reform efforts are seriously flawed because they tend to forbid the condemnation of the property of the wealthy and the middle class for “economic development,” but allow the condemnation of land on which poor people live under the guise of alleviating “blight.” This, he claims, results in reform laws that “privilege[] the stability of middle-class households relative to the stability of poor households” and “express[] the view that the interests and needs of poor households are relatively unimportant.”<sup>2</sup>

I agree with Professor Dana that the problem of blight condemnations and its impact on the poor deserves much greater attention, and that post-*Kelo* reform initiatives should do more to address these concerns. However, I disagree with his argument that post-*Kelo* reform efforts have systematically treated land where the poor tend to live worse than that of middle and upper class homeowners. As of this time (April 2007), most of the states that have enacted post-*Kelo* reform laws have either banned both blight and economic development takings (five states, plus Utah, which enacted its reform law prior to *Kelo*), or defined “blight” so broadly that virtually any property can be declared “blighted” and taken (sixteen states). Several other states have enacted reforms that provide no real protection to any property owners because of other types of shortcomings. Only nine are

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<sup>1</sup> David Dana, *The Law and Expressive Meaning of Condemning the Poor after Kelo*, 101 NW. U. L. REV. 365 (2007), 101 NW. U. L. REV. COLLOQUY 5 (2006), <http://www.law.northwestern.edu/lawreview/colloquy/2006/2/> (subsequent citations refer to 101 NW. U. L. REV. 365 (2007)).

<sup>2</sup> *Id.* at 365.

actually guilty of the sin condemned by Professor Dana: allowing only the condemnation of “blighted” areas narrowly defined.

To the extent that some states have indeed banned “economic development” condemnations in affluent neighborhoods while permitting blight condemnations to go on in poor ones, I agree that this is a lamentable state of affairs. However, it may still be a better result than simply subjecting all property to the risk of economic development takings. A law that protects the property rights of most but not all of the population is preferable to one that protects no one. Such a law might also benefit many poor people who live in non-blighted areas and are potentially vulnerable to economic development takings. Survey data suggests that the poor themselves overwhelmingly oppose economic development condemnations.

Furthermore, the exclusion of blighted property from bans on “economic development” condemnations in some states is not necessarily explained by indifference to or contempt for the interests of the poor. There are perfectly non-invidious (though in my view flawed) reasons for believing that condemnation is sometimes necessary to eliminate blight. There are few or no good reasons, however, to use condemnation to promote economic development through the transfer of property to private owners.

#### I. POST-KELO REFORM AND THE POOR

Since *Kelo v. City of New London*<sup>3</sup> was decided in June 2005, twenty-eight states have enacted eminent domain reforms through the regular legislative process and ten (including several that also enacted legislative reforms) by referendum. Altogether, thirty-five states have enacted reforms that purport to ban or restrict “economic development” takings. The state of Utah banned both economic development takings and blight condemnations in early 2005, before *Kelo* was decided.<sup>4</sup> Seventeen of the twenty-eight reforms enacted by state legislatures are largely ineffective, providing little or no real protection to property owners against economic development takings.<sup>5</sup> This is also true of several of the reforms enacted by referendum. With respect to these states, Professor Dana’s claim that middle class households are getting better protection than the poor are is incorrect because, quite simply, neither group is getting any real protection at all.

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<sup>3</sup> 545 U.S. 469 (2005).

<sup>4</sup> See UTAH CODE ANN. § 17C-1-202 (amended May 1, 2006) (outlining powers of redevelopment agencies and omitting the power to use eminent domain for blight alleviation or development); see also Henry Lamb, *Utah Bans Eminent Domain Use by Redevelopment Agencies*, ENV’T NEWS, June 1, 2005, available at <http://www.heartland.org/article.cfm?artID=17162> (describing the politics behind the Utah law).

<sup>5</sup> I discuss this in much greater detail in a recent paper. See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo* (George Mason Law & Econ. Research Paper No. 07-14, 2007), available at <http://ssrn.com/abstract=976298>.

In at least sixteen states, post-*Kelo* reforms have been ineffective because they contain “blight” exceptions so broad that virtually any property can be defined as “blighted”—including property in middle class or even wealthy neighborhoods.<sup>6</sup> For example, nine state post-*Kelo* laws incorporate definitions of “blight” that include any area where there are obstacles to “sound growth” or conditions that constitute an “economic or social liability.” These include reform laws in Alaska,<sup>7</sup> Colorado,<sup>8</sup> Missouri,<sup>9</sup> Ne-

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<sup>6</sup> For a more detailed analysis of these reform laws and the reasons why they are unlikely to have any meaningful effect, see *id.* at 15–21.

<sup>7</sup> See H.B. 318, 24th Leg., Reg. Sess. (Alaska 2006) (enacted July 5, 2006) (exempting preexisting public uses declared in state law from a ban on economic development takings); ALASKA STAT. § 18.55.950 (2006) (“[B]lighted area’ means an area, other than a slum area, that by reason of the predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, unsanitary or unsafe conditions, deterioration of site or improvements, tax or special assessment delinquency exceeding the fair value of the land, improper subdivision or obsolete platting, or the existence of conditions that endanger life or property by fire and other causes, or any combination of these factors, substantially impairs or arrests the sound growth of the municipality, retards the provision of housing accommodations, or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare in its condition and use.”). Professor Dana interprets this statute as failing to address blight condemnations “at all.” Dana, *supra* note 1, at 375. However, the text of the law does in fact exempt blight condemnations from its scope by exempting all preexisting public uses declared in state law, of which blight is one.

<sup>8</sup> See H.B. 1411, 65th Gen. Assem., Reg. Sess. (Colo. 2006) (enacted June 6, 2006) (allowing condemnation for “eradication of blight”); COLO. REV. STAT. § 31-25-103(2) (2006) (defining “blight” to include any condition that “substantially impairs or arrests the sound growth of the municipality, retards the provision of housing accommodations, or constitutes an economic or social liability, and is a menace to the public health, safety, morals, or welfare”).

<sup>9</sup> See S.B. 1944, § 523.271.2, 93rd Gen. Assem., Reg. Sess. (Mo. 2006) (enacted July 13, 2006) (exempting blight condemnations from the ban on “economic development” takings); MO. REV. STAT. § 100.310(2) (2006) (defining “blight” as “an area which, by reason of the predominance of defective or inadequate street layout, insanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, retards the provision of housing accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition and use”).

braska,<sup>10</sup> North Carolina,<sup>11</sup> Ohio,<sup>12</sup> Texas,<sup>13</sup> Vermont,<sup>14</sup> and West Virginia.<sup>15</sup> Any obstacle to economic development can easily be defined as impairing “sound growth,” making this definition of blight broad enough to justify virtually any condemnation that could be justified under an economic development rationale. Similarly, any impediment to “economic development” can be considered an “economic or social liability.” Seven other states, including Illinois, Iowa, Kentucky, Maine, Tennessee, Wisconsin,<sup>16</sup> and the crucial state of California,<sup>17</sup> have differently worded but comparably broad blight exemptions. Several more states have enacted post-*Kelo* laws that fail to protect property owners for other reasons.<sup>18</sup>

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<sup>10</sup> See L.B. 924, 99th Leg., 2nd Sess. (Neb. 2006) (enacted Apr. 13, 2006) (exempting “blight” condemnations from ban on economic development takings); NEB. REV. STAT. § 18-2103 (2006) (defining blight to include any area in a condition that “substantially impairs or arrests the sound growth of the community, retards the provision of housing accommodations, or constitutes an economic or social liability” and has “deteriorating” structures).

<sup>11</sup> See H.B. 1965, § 2.1, 2005 Gen. Assem., Reg. Sess. (N.C. 2006) (enacted Aug. 10, 2006) (exempting blight condemnations from restrictions on economic development takings and stating that “[b]lighted area” shall mean an area in which there is a predominance of buildings or improvements (or which is predominantly residential in character), and which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, unsanitary or unsafe conditions, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs the sound growth of the community, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime, and is detrimental to the public health, safety, morals or welfare”).

<sup>12</sup> See S.B. 167, § 1, 126th Gen. Assem., Reg. Sess. (Ohio 2005) (exempting “blight” condemnations from temporary moratorium on economic development takings); OH. REV. CODE ANN. § 303.26(E) (West 2006) (defining blight to include “deterioration” of structures or where the site “substantially impairs or arrests the sound growth of a county, retards the provision of housing accommodations, or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare”).

<sup>13</sup> See S.B. 7, 79th Leg., 2nd Sess. (Tex. 2005) (enacted Sept. 1, 2005) (exempting “blight” condemnations from the ban on economic development takings); TEX. LOC. GOV’T CODE ANN. § 374 (Vernon 2006) (defining a “blighted area” as one that “because of deteriorating buildings, structures, or other improvements; defective or inadequate streets, street layout, or accessibility; unsanitary conditions; or other hazardous conditions, adversely affects the public health, safety, morals, or welfare . . . or results in an economic or social liability to the municipality”).

<sup>14</sup> See S.B. 246, 2005–06 Leg., Reg. Sess. (Vt. 2006) (exempting blight condemnations from ban on economic development takings, and defining blight to include any planning or layout condition that “substantially impairs or arrests the sound growth of a municipality, retards the provision of housing accommodations or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare”).

<sup>15</sup> See H.B. 4048, 77th Leg., Reg. Sess. (W. Va. 2006) (enacted Apr. 2006) (exempting blight condemnation from the ban and defining blight to include an area that, for any number of factors such as deterioration or inadequate street layout, “substantially impairs or arrests the sound growth of a municipality, retards the provision of housing accommodations or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare”).

<sup>16</sup> For a discussion of blight exemptions in these states, see Somin, *supra* note 5, at 18–22.

<sup>17</sup> *Id.* at 21–22.

<sup>18</sup> *Id.* at 26–28.

State courts have, for decades, interpreted similar definitions of blight to allow the condemnation of nearly any property a local government seeks to acquire. For example, recent state appellate court decisions have held that Times Square in New York City<sup>19</sup> and downtown Las Vegas<sup>20</sup> are “blighted,” thereby justifying condemnations undertaken to acquire land for a new headquarters for the *New York Times* and parking lots for a consortium of local casinos respectively. If these areas can be considered blighted, so too could virtually any others. Sixteen states, however, have enacted post-*Kelo* reform laws that do provide substantial protection for property owners relative to that which existed previously—nine by legislation, four by referendum initiative, and three by both of these means.<sup>21</sup> Many of these jurisdictions, however, have banned blight condemnations as well as “economic development” takings, thereby contradicting Professor Dana’s argument that Post-*Kelo* reform has ignored the needs of poor people who live in blighted areas.

The state of Florida has banned blight condemnations and economic development takings in its unusually strong post-*Kelo* reform law,<sup>22</sup> despite its extensive past use of blight condemnations. Referendum initiatives in Nevada and North Dakota similarly ban blight condemnation completely.<sup>23</sup> South Dakota’s post-*Kelo* reform law continues to permit blight condemnations, but greatly reduces the political incentive to engage in them by forbidding the transfer of condemned property to private parties.<sup>24</sup> This rule prevents the use of blight condemnations to transfer property to politically influential interest groups, eliminating one of the main political incentives for undertaking them in the first place. Kansas’s new law, meanwhile, limits blight condemnations to cases where the property in question is “unsafe for occupation by humans under the building codes.”<sup>25</sup> And as we have seen, the Utah reform law enacted a few months before *Kelo* also banned blight condemnations.

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<sup>19</sup> See *In re W. 41st St. Realty v. N.Y. State Urban Dev. Corp.*, 744 N.Y.S.2d 121 (N.Y. App. Div. 2002).

<sup>20</sup> See *City of Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1, 12–15 (Nev. 2003).

<sup>21</sup> See Somin, *supra* note 5, at 10–14.

<sup>22</sup> See H.B. 1567, 2006 Leg., Reg. Sess. (Fla. 2006) (enacted May 11, 2006).

<sup>23</sup> See Nev. Ballot Question 2 (enacted Nov. 7, 2006 as NEV. CONST. art. I, § 22 §§ 1) (forbidding the “direct or indirect transfer of any interest in property taken in an eminent domain proceeding from one private party to another private party”); N.D. Measure 2 (enacted Nov. 7, 2006 as N.D. CONST. art. I, § 16) (“[P]ublic use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health. Private property shall not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business.”).

<sup>24</sup> H.B. 1080, 2006 Leg., Reg. Sess. (S.D. 2006) (signed into law Feb. 27, 2006). Professor Dana claims that South Dakota’s law doesn’t address blight condemnations “at all.” Dana, *supra* note 1, at 375. However, private-to-private blight condemnations are surely covered by the law’s general ban on private-to-private takings of any kind.

<sup>25</sup> S.B. 323, §§ 1–2, 2006 Leg., Reg. Sess. (Kan. 2006) (signed into law May 18, 2006).

In sum, of the seventeen states (counting Utah) that have recently enacted eminent domain reform laws with real teeth of any kind, six have either abolished blight condemnations or come close to doing so. Of the remaining eleven states, most do indeed protect middle and upper class neighborhoods by defining blight narrowly.<sup>26</sup> However, two of these states—Minnesota and Pennsylvania—also provide only very limited protection even to middle class neighborhoods because their bans on economic development takings exempt the major urban areas (Philadelphia, Pittsburgh, and the Twin Cities) where most of those states' condemnations take place.<sup>27</sup>

Overall, only nine of the thirty-six states that have enacted reform legislation in the wake of *Kelo* or, in the case of Utah, immediately before it, seem to even roughly fit the predictions of Professor Dana's thesis that post-*Kelo* reform protects the middle class and the wealthy without protecting the poor. The states in this category include Alabama, Arizona, Georgia, Idaho, Indiana, Louisiana, Michigan, Oregon, and New Hampshire.<sup>28</sup> The remaining new laws either protect both groups more or less equally or provide no meaningful protection to anyone.

This pattern—combined with the broad “blight” exceptions in many of the post-*Kelo* laws—partially undermines Professor Dana's claims that post-*Kelo* reform protects the wealthy and the middle class at the expense of the poor. On the other hand, it is important to recognize—as I and other scholars have contended in earlier work—that both blight and economic development condemnations do, in practice, victimize the poor disproportionately.<sup>29</sup> This is a serious problem, and one that requires greater scholarly, judicial, and legislative attention. However, post-*Kelo* reform has not noticeably exacerbated the problem, and in those states that have abolished or substantially curbed blight condemnations, reform may well help to alleviate it.

## II. ARE REFORM LAWS THAT STILL PERMIT BLIGHT CONDEMNATIONS BAD FOR THE POOR?

Given that nine states have indeed enacted post-*Kelo* reform laws that fit the pattern outlined by Professor Dana, it is still important to ask whether such laws do in fact harm the poor for the benefit of the relatively affluent, as he contends. Moreover, eleven state supreme courts have banned economic development takings under their state constitutions (including two since *Kelo*), and none of them have so far also banned blight condemna-

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<sup>26</sup> See Somin, *supra* note 5, at 28–33 (discussing these laws in detail).

<sup>27</sup> *Id.* at 27–30.

<sup>28</sup> *Id.* at 26–29.

<sup>29</sup> See, e.g., Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183 (2007); Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003).

tions.<sup>30</sup> While I agree with Professor Dana's view that the impact of eminent domain on the poor deserves greater consideration than it has so far received, I am not persuaded that post-*Kelo* reforms banning economic development takings while narrowing the definition of blight are worse than the pre-*Kelo* status quo. Such laws can provide valuable, even if still inadequate, protection to the poor. And even if these reforms fail to help the poor, they are unlikely to inflict additional harm on them.

It is important to recognize that even condemnations in "nonblighted" areas are likely to disproportionately victimize the relatively poor. For example, the notorious 1981 *Poletown* takings in Detroit displaced some 4000 mostly working class residents of a Detroit neighborhood so that General Motors could build a new factory to promote "economic development."<sup>31</sup> Reform statutes that ban economic development takings while simulta-

<sup>30</sup> The eleven states are Arkansas, Florida, Illinois, Kentucky, Maine, Michigan, Montana, Ohio, Oklahoma, South Carolina, and Washington. See *City of Little Rock v. Raines*, 411 S.W.2d 486, 494–95 (Ark. 1967) (private economic development project not a public use); *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So.2d 451, 457 (Fla. 1975) (holding that a "'public [economic] benefit' is not synonymous with 'public purpose' as a predicate which can justify eminent domain"); *Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1, 9–11 (Ill. 2002) (holding that a "contribu[ti]on to positive economic growth in the region" is not a public use justifying condemnation), *cert. denied*, 537 U.S. 880 (2002); *City of Owensboro v. McCormick*, 581 S.W.2d 3, 8 (Ky. 1979) ("No 'public use' is involved where the land of A is condemned merely to enable B to build a factory.") (citation omitted); *Opinion of the Justices*, 131 A.2d 904, 906 (Me. 1957) (holding that private "industrial development" to enhance economy is not a public use); *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (overruling *Poletown* and holding that economic development takings are unconstitutional); *City of Bozeman v. Vaniman*, 898 P.2d 1208, 1214 (Mont. 1995) (holding that a condemnation that transfers property to a "private business" is unconstitutional unless the transfer to the business is "insignificant" and "incidental" to a public project); *City of Norwood v. Horney*, 853 N.E.2d 1115, 1141–42 (Ohio 2006) (following *Hathcock* in holding that "economic benefit" alone does not justify condemnation); *Bd. of County Comm'rs of Muskogee County v. Lowery*, 136 P.3d 639, 642 (Okla. 2006) (holding that "economic development" is not a "public purpose" under the Oklahoma Constitution); *Ga. Dep't of Transp. v. Jasper County*, 586 S.E.2d 853, 856 (S.C. 2003) (holding that even a substantial "projected economic benefit" cannot justify condemnation); *Karesh v. City of Charleston*, 247 S.E.2d 342, 345 (S.C. 1978) (striking down a taking justified only by economic development because such condemnations do not ensure "that the public has an enforceable right to a definite and fixed use of the property" (quoting 29 C.J.S. *Eminent Domain* § 31)); *In re City of Seattle*, 638 P.2d 549, 556–57 (Wash. 1981) (disallowing plan to use eminent domain to build retail shopping as not for a public use); *Hogue v. Port of Seattle*, 341 P.2d 171, 187 (Wash. 1959) (denying condemnation of residential property where government sought to "devote it to what it considers a higher and better economic use"). In some of these states, the wording of the state constitution restricts private-to-private condemnations much more explicitly than does the Federal Takings Clause. See, e.g., *Muskogee*, 136 P.3d at 651–52 (discussing differences between the wording of the Oklahoma Constitution and that of the Fifth Amendment and using the distinction as justification for interpreting the state takings clause in a way contrary to the U.S. Supreme Court's interpretation of the Federal Takings Clause in *Kelo*). The *Norwood* case did, however, suggest that some blight condemnations would violate the state constitution. See Ilya Somin, *Blight Sweet Blight*, LEGAL TIMES, Aug. 14, 2006, at 42 (discussing this aspect of *Norwood*).

<sup>31</sup> See Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1011–16. The *Poletown* condemnations were upheld in *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled by Hathcock*, 684 N.W.2d at 765.

neously narrowing the definition of blight could well prevent future *Pole-towns*. This is a valuable achievement, even if it still fails to protect poor people living in truly “blighted” areas.

Perhaps, however, such tangible benefits for the poor might be outweighed by the “expressive” harms emphasized by Professor Dana.<sup>32</sup> It is theoretically possible that the poor feel so stigmatized by the supposed “message” that their households are “fundamentally unequal in importance” to middle class homes that they might be willing to forego the tangible legal protection provided by post-*Kelo* reforms that ban economic development takings but do not completely abolish blight condemnations.<sup>33</sup>

We cannot know for sure whether the poor feel this way. However, survey evidence suggests that most do not. Professor Dana notes that “poor people subject to blight condemnation differ from the middle-class people subject to economic development condemnation in two important respects: they are more often renters than home owners, and they have less income and wealth.”<sup>34</sup> Strikingly, however, neither of these important dividing lines is a strong predictor of public opinion on economic development takings. Rich and poor and renters and homeowners all oppose them by lopsided margins. Table 2 shows that all of these groups also support laws banning condemnations for private development.

While survey evidence may not be a good indication of the physical and economic effects of condemnation on the poor, they provide an important window on the “expressive” and dignitary harms emphasized by Professor Dana. If the poor themselves oppose *Kelo* and support laws banning economic development takings, that suggests that any such harms are either nonexistent or so minor as to be imperceptible to their supposed victims.

As Table 1 demonstrates, the November 2005 Saint Index survey of public opinion on *Kelo* shows that strong opposition to the decision cuts across class lines.<sup>35</sup> Seventy percent of respondents from households earning under \$10,000 per year expressed opposition, and 80% from those earning \$10,000 to \$24,999. This is only slightly lower than the 89% opposition expressed by middle income households earning \$35,000 to \$49,999 (the highest rate for any income group), and actually higher than

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<sup>32</sup> Dana, *supra* note 1, at 380–81.

<sup>33</sup> *Id.* at 381.

<sup>34</sup> *Id.* at 380.

<sup>35</sup> Center for Economic and Civic Opinion at University of Massachusetts/Lowell, The Saint Index Poll, Oct.–Nov. 2005 [hereinafter Saint Index] (unpublished survey, on file with author). Question wording: “The U.S. Supreme Court recently ruled that local governments can take homes, business and private property to make way for private economic development if officials believe it would benefit the public. How do you feel about this ruling?” *Id.*

that expressed by the very wealthiest category (those earning over \$150,000), of whom “only” 68% opposed *Kelo*.<sup>36</sup>

The Saint Index survey question asked respondents whether they supported the Supreme Court ruling holding that “local governments can take homes, business and private property to make way for private economic development if officials believe it would benefit the public.”<sup>37</sup> Significantly, it refers only to “economic development” condemnations and does not mention blight.

The same survey also shows that renters oppose *Kelo* almost as strongly as homeowners, thus casting doubt on Professor Dana’s suggestion that post-*Kelo* reform inflicts dignitary harms on the former for the benefit of the latter.<sup>38</sup> The *Kelo* decision was opposed by 83% of homeowners and 70% of renters, including 54% of the latter who opposed the decision “strongly.”<sup>39</sup> While the percentage of renters opposing economic development takings was smaller than that of homeowners, it was still a lopsided 70% to 28% margin.<sup>40</sup>

Table 1: Public Opinion on Kelo by Household Income<sup>41</sup>

HOUSEHOLD INCOME	VIEWS ON KELO	
	% Agree with Decision	% Disagree (“Strongly Disagree”)
Under \$10,000	25	70 (58)
\$10,000–\$24,999	20	80 (61)
\$25,000–\$34,999	18	80 (62)
\$35,000–\$49,999	11	89 (68)
\$50,000–\$74,999	15	85 (67)
\$75,000–\$150,000	25	73 (57)

<sup>36</sup> One might expect this group to be the least opposed to economic development takings because it is highly unusual for property belonging to the wealthy to be condemned for transfer to other private parties.

<sup>37</sup> Saint Index, *supra* note 35.

<sup>38</sup> Dana, *supra* note 1, at 380–81.

<sup>39</sup> Saint Index, *supra* note 35.

<sup>40</sup> *Id.*

<sup>41</sup> Saint Index, *supra* note 35. Question wording: “The U.S. Supreme Court recently ruled that local governments can take homes, business and private property to make way for private economic development if officials believe it would benefit the public. How do you feel about this ruling?” *Id.*

Over \$150,000	32	68 (48)
<i>Total</i>	18	81 (63)

Table 2 provides direct evidence of popular support for state reform laws that ban condemnation of property for transfer to private developers—the sorts of takings at issue in *Kelo*.<sup>42</sup> Here too, survey respondents in all income categories supported post-*Kelo* reform by lopsided—and roughly equal—margins. Although the very poorest respondents supported reform laws by the smallest margin of any income group—62% to 28%—supporters still outnumbered opponents by more than two to one in that income class. And the highest rate of support from any income group was that recorded in the second-lowest category, households earning between \$10,000 and \$24,999 per year. This group of relatively poor respondents supported the enactment of laws banning condemnation of property for “private development” by an overwhelming 76% to 19% margin. The 2006 Saint Index survey does provide modest support for Professor Dana’s claim that renters’ interests differ from those of homeowners. Only 48% of renters supported reform laws in the survey, compared to 31% who were opposed.<sup>43</sup> By contrast, 78% of homeowners supported banning takings for “private development,” with only 21% opposed.<sup>44</sup> Even among renters, however, supporters of banning takings for private development outnumbered opponents by roughly a three to two margin.

Table 2: Public Opinion on Post-*Kelo* Reform by Household Income<sup>45</sup>

HOUSEHOLD INCOME	VIEW ON POST-KELO REFORM	
	% SUPPORT (“STRONGLY SUPPORT”)	% OPPOSE (“STRONGLY OPPOSE”)
Under \$10,000	62 (36)	28 (13)

<sup>42</sup> The wording of this survey is a bit unfortunate because it speaks of banning condemnations for “private development,” whereas the standard rationale for *Kelo*-style condemnations is that they benefit the general public, not just “private” interests. However, such differences in wording seem to have only a minor impact on survey respondents’ expressed attitudes to economic development takings. For more detailed discussion, see Somin, *supra* note 5, at 6–7 & n.34.

<sup>43</sup> Center for Economic and Civic Opinion at University of Massachusetts/Lowell, The Saint Index Poll, Sept.–Oct. 2006 (unpublished survey, on file with author).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* Question wording: “Some states are considering enacting laws that will stop state and local governments from taking private property for private development projects. Would you . . . [Strongly Support, Support, Oppose, Strongly Oppose, or don’t know] such laws?” *Id.*

HOUSEHOLD INCOME	VIEW ON POST-KELO REFORM	
	% SUPPORT ("STRONGLY SUPPORT")	% OPPOSE ("STRONGLY OPPOSE")
\$10,000–\$24,999	76 (48)	19 (8)
\$25,000–\$34,999	65 (40)	29 (15)
\$35,000–\$49,999	75 (44)	21 (8)
\$50,000–\$74,999	69 (39)	23 (10)
\$75,000–\$150,000	73 (49)	23 (9)
Over \$150,000 <sup>46</sup>	N/A	N/A
<i>Total</i>	71 (43)	23 (10)

I am also skeptical of Professor Dana's assumption that most of the non-poor voters who support post-*Kelo* reforms banning economic development takings, but not blight takings, do so because they believe that "staying in your home only really matters if you are a middle-class person in a middle-class home."<sup>47</sup> It is possible that some voters hold this view. However, many others might believe that blight condemnations actually help the poor by "cleaning up" their neighborhoods. This was part of the historic rationale for blight condemnations, as Professor Dana admits.<sup>48</sup>

He emphasizes—and I emphatically agree—that real-world blight condemnations frequently harm the poor, often benefiting wealthy or middle class interests at their expense.<sup>49</sup> However, given widespread public ignorance about takings policy—ignorance so great that most people did not realize that *Kelo* made little change to existing legal doctrine and that economic development takings were widespread before that decision<sup>50</sup>—it is quite possible that most middle class and affluent voters were simply unaware of this record. In the same way, they seem to have been unaware of the fact that most states—especially prior to the post-*Kelo* reforms—defined blight so broadly that even middle class homes could easily be condemned on that

<sup>46</sup> Only two respondents were recorded in this category.

<sup>47</sup> Dana, *supra* note 1, at 380.

<sup>48</sup> *Id.* at 370; see also Pritchett, *supra* note 29, at 14–43 (describing the history of this rationale).

<sup>49</sup> Dana, *supra* note 1, at 381–82.

<sup>50</sup> See Somin, *supra* note 5, at 37–43 (discussing political ignorance about eminent domain policy and its role in the *Kelo* backlash in great detail).

basis.<sup>51</sup> Indeed, it may be that large numbers of voters who support various types of post-*Kelo* reform are completely unaware of the existence of blight condemnations, just as the majority of citizens are sometimes unaware of the existence of other important government policies.<sup>52</sup>

Had they been aware of the true effects of many blight condemnations, it is far from clear that most voters would have approved of them. A poll of 800 New Jersey residents taken in the fall of 2006 found that 86% disapproved of “[t]ak[ing] low value homes from people in order to build higher value homes,” while only 7% supported such condemnations.<sup>53</sup> Many blight condemnations, of course, do exactly that.<sup>54</sup> Unless New Jersey opinion is highly unrepresentative of the rest of the country, it seems likely that ignorance, not contempt for the poor, accounts for the public’s indifference to blight condemnations.

By the same token, it is possible that many of the low income survey respondents who support a ban on economic development takings also do so out of ignorance, perhaps not realizing that it will not protect them against blight condemnations. This is less likely, however, since large numbers of poor people have personal experience with blight takings, either because they themselves have been displaced by them or because they may know other people who have.<sup>55</sup> By contrast, very few middle class or wealthy voters are likely to have had comparable experiences.

Finally, it is worth noting that even a knowledgeable and sophisticated voter might have rational reasons for supporting a ban on economic development takings, while letting government retain the power to condemn at least some “blighted” areas, narrowly defined. As I have argued in great detail in a recent article, market mechanisms can, in most cases, accomplish the goals of economic development takings without the need for eminent domain.<sup>56</sup> By contrast, private sector elimination of blight may sometimes be stymied by collective action problems requiring government intervention to overcome.<sup>57</sup> My own view is that a ban on blight condemnations is prob-

<sup>51</sup> *Id.* at 38–39.

<sup>52</sup> For example, a 2003 survey showed that 70% of respondents were unaware of the passage of President Bush’s massive prescription drug bill, the largest new government program in almost forty years. See Ilya Somin, *Political Ignorance is No Bliss*, Cato Institute Policy Analysis No. 525, Sept. 22, 2004, at 6 tbl.1. This paper also gives many similar examples of widespread ignorance about major policy issues.

<sup>53</sup> Janice Nadler et al., *Government Takings of Private Property: Kelo and the Perfect Storm*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 23 tbl.4 (Nathan Persily et al. eds., forthcoming 2007), available at <http://ssrn.com/abstract=962170>.

<sup>54</sup> See Somin, *supra* note 29, at 267–70.

<sup>55</sup> Since World War II, some 3.6 million mostly poor Americans have been displaced by “urban renewal” condemnations alone. *Id.* at 269.

<sup>56</sup> *Id.* at 204–10.

<sup>57</sup> *Id.* at 270.

ably desirable, even in spite of such concerns. Other specialists surely disagree, however.

In the absence of survey data directly addressing the issue, it is impossible to definitively determine whether Professor Dana's claim that voters are motivated by disdain for the interests of the poor is correct. I suspect that a significant number of voters may indeed see the issue as he conjectures. But most probably do not. At this point, however, I emphasize only that his is only one of several possible explanations for the laws he describes and that there are competing explanations supported by at least some substantial evidence.

Finally, even if Professor Dana is right about voters' motivations, the motives for enacting a law are less important than its effects. As explained above, a ban on economic development takings combined with a restrictive definition of blight can provide real benefits to the poor even if middle class voters do not intend such a result.

#### CONCLUSION

Twenty-seven of the thirty-six state reform laws enacted since 2005 do not reflect the combination of forbidding economic development condemnations while permitting "blight" condemnations only in poor areas that Professor Dana decries. Most either ban both blight and economic development takings or define "blight" so broadly that even middle class homes could be condemned.

To the extent that some reform laws do fit the Dana pattern, it is far from clear that they are worse than the pre-*Kelo* status quo. A ban on economic development takings provides at least some valuable protection for the poor, even if incomplete. At the same time, there is little evidence that it inflicts any "expressive harms" on them.

The available evidence suggests that most of the poor either do not perceive a ban on economic development takings as an expressive harm, or at least do not believe that this harm outweighs the benefits of a ban. It is also far from clear that those middle class and wealthy voters who continue to support "blight condemnations" do so because of an invidious belief that the poor are less worthy of protection. Outside observers should therefore be cautious about inferring the existence of expressive harms unless and until we have firm evidence that they are real and that their magnitude is significant enough to outweigh the benefits—including the benefits to the poor—of a ban on economic development takings. Like most other legislation, post-*Kelo* reform laws should be judged by their effects, not by the intentions of their supporters.

